Transcript

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## BEFORE THE FEDERAL COMMUNICATIONS COMMISSION

NFL ENTERPRISES LLC,

Complainant,

v.

MB Docket No. 08-214

COMCAST CABLE, COMMUNICATIONS LLC,

File No. CSR-7876-P

Defendant.

Volume 6

The Federal Communications Commission

445 12th Street, SW Hearing Room TW-A363 Washington, D.C. 20554

Wednesday, April 15, 2009

9:30 a.m.

BEFORE:

RICHARD L. SIPPEL,

Chief Administrative Law Judge

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- 1 P-R-O-C-E-E-D-I-N-G-S
- 2 9:36 a.m.
- JUDGE SIPPEL: Let's go on the
- 4 record. This is the 15th of April. Some call
- 5 it Tax Day. But this is actually a hearing
- 6 day and we still have Dr. Singer on the stand
- 7 under cross examination by Mr. Burke. I do
- 8 have some -- However, before we proceed any
- 9 further, I do have some preliminary matters,
- 10 a preliminary matter, and I think you all are
- 11 aware of it.
- 12 You could stay where you are, sir,
- or you can walk around if this gets too
- 14 laborious, but we're going to probably be
- 15 about 10 or 15 minutes on this.
- 16 THE WITNESS: I think this is the
- 17 most comfortable chair in the room.
- JUDGE SIPPEL: Probably is. Okay.
- 19 It is?
- 20 (Laughter.)
- 21 All right. And I want to be sure
- 22 that I don't do what I did yesterday and

- 1 inadvertently overlook the Bureau because I'm
- very interested in the Bureau's views on this.
- 3 In fact, you can start, Mr. Schonman, if you
- 4 want.
- We have the letter from counsel
- 6 for Bloomberg and he raises some very, I
- 7 think, interesting but also very serious first
- 8 consideration matters with respect to my
- 9 exclusion of yesterday. I was very broad with
- 10 it thinking that the fact that this is an
- 11 expedited case by the Commission. It's a
- 12 question of weighing time versus I guess what
- 13 really is a 1st Amendment issue and I sort of
- 14 came out on the time, maybe too much too
- 15 quickly.
- So I want to flesh this out. I've
- 17 got some ideas in terms of where I want to go
- 18 from here. But let me first hear. Have you
- 19 seen the letter from Bloomberg?
- 20 MR. SCHONMAN: I have seen the
- 21 letter, Your Honor, and certainly the
- 22 information that we're trying to protect here

- 1 is the confidential information of the named
- 2 parties in the case. They are entities with
- 3 the interest in protecting that information.
- 4 Traditionally, of course, these
- 5 hearings have been opened to the public. I
- 6 think to the extent that Your Honor can
- 7 accommodate the press and the named parties in
- 8 the case and their interest in protecting the
- 9 information that would be most favorable. I
- 10 think it's up to the named parties to try to
- 11 work out some arrangement here where they can
- 12 accommodate Your Honor's interest in carrying
- 13 forth the tradition of having an open hearing
- 14 to the extent that's possible.
- MR. SCHMIDT: And, Your Honor, we
- 16 actually did, Mr. Carroll and I, had the
- 17 chance to speak about this this morning and I
- 18 think a very straightforward resolution that's
- 19 not already proposed that makes sense to us
- 20 which is simply that there be a redacted
- 21 transcript prepared as it becomes available
- 22 where the parties have the chance to redact

- 1 out the confidential information and then the
- 2 other information can be known by the public.
- 3 And the only accommodation that we would ask
- 4 for in that regard is just that we recognize
- 5 that the reporter has a lot on her plate in
- 6 terms of preparing the transcript. So we then
- 7 just have a very brief period to go through
- 8 it.
- 9 JUDGE SIPPEL: Are we getting our
- 10 -- Is somebody getting overnight on this?
- 11 MR. SCHMIDT: That's what we're
- 12 aiming to do, Your Honor.
- MR. CARROLL: We have asked for
- 14 daily. I think we just received Monday's
- 15 transcript and I don't know when we will
- 16 receive yesterday's transcript. But we're
- 17 starting off the day in agreement once again.
- 18 I would --
- 19 JUDGE SIPPEL: I always suspect
- 20 that. I get suspicious. Go ahead, Mr.
- 21 Carroll.
- MR. CARROLL: But I agree that I

- 1 think it was the Bloomberg gentleman who in
- 2 the submission to Your Honor last evening
- 3 proposed this as a compromised arrangement
- 4 under which the live testimony itself would be
- 5 closed. But as soon as the transcripts are
- 6 turned out on a daily basis, they would be
- 7 quickly expeditiously reviewed by each side
- 8 redacting out what's highly confidential in
- 9 them and then the transcripts will be made
- 10 available to the public. We are fine with
- 11 that on the Comcast side of a way to
- 12 accommodate both the interests of the parties
- 13 themselves in the proceeding and their
- 14 confidential information and the 1st Amendment
- 15 interest of the press and having access to
- 16 that information.
- JUDGE SIPPEL: Well, you know that
- 18 sounds like a very reasonable approach and I
- 19 agree that with your -- that's pretty much
- 20 precisely what Mr. Glasser said in his letter
- 21 which I thought again was a very reasonable
- 22 compromise.

- But I've got the ultimate
- 2 responsibility for how this hearing is
- 3 conducted and I have a very strong leaning
- 4 towards openness. Sure, there are reasons to
- 5 treat some things as confidential. I think
- 6 the most significant is if it's personal
- 7 matter and I've had many situations like that
- 8 come up. But that's relatively easy to handle
- 9 because it's usually just a one party
- 10 situation and it's just a one item situation.
- 11 This is spread all over the lot.
- 12 And I agree that there needs to be
- 13 a lot of tight confidentiality with respect to
- 14 discovery because discovery goes all over the
- 15 place. But this is the day of reckoning and
- 16 I don't think there's the same considerations
- 17 with respect to protecting discovery business
- 18 material and a hearing where it's a public
- 19 hearing and there's a lot of interest in terms
- 20 of why decisions are being made in this case
- 21 and how they're being made and it's hard for
- 22 anybody to understand it without being here.

- Now I think that I want to start
- 2 with the compromise and I'm very much in favor
- 3 of that, although I would ask if there's any
- 4 way that you can expedite better, faster,
- 5 those transcripts and it's up to the parties
- 6 to get the copies made, whatever Mr. Fiske up
- 7 here needs, and you know have a dozen copies
- 8 or what not and get them in his office the
- 9 next morning or as close as you can. And also
- 10 I would ask that you be very, very careful
- 11 with the redact.
- Now I heard Mr. Hawkins testify
- 13 all day yesterday and I didn't hear a heck of
- 14 a lot of things in there that should be
- 15 redacted. I haven't had a chance to go back
- 16 and reread his transcript, this testimony, but
- 17 I would like by noon today or let me back up,
- 18 by the end of the day today I want his written
- 19 testimony to be out there on the press table
- 20 with redacts if you think that they're
- 21 appropriate and a copy to me because I want to
- 22 see what the redacts are.

- 1 MR. SCHMIDT: Well, Your Honor, I
- 2 don't have that.
- JUDGE SIPPEL: I got it. I'll
- 4 give you mine if you want. It's written
- 5 testimony.
- 6 MR. SCHMIDT: Oh, his written
- 7 testimony?
- JUDGE SIPPEL: Yes, sir.
- 9 PARTICIPANT: I'm sorry, Your
- 10 Honor.
- 11 JUDGE SIPPEL: Not the transcript.
- 12 His written testimony. I mean let's give the
- 13 public something for goodness sakes.
- MR. SCHMIDT: We already have
- 15 redacted copies of the written testimony.
- 16 JUDGE SIPPEL: You do? Of the
- 17 transcript?
- 18 MR. SCHMIDT: Yes, Your Honor.
- 19 JUDGE SIPPEL: Well, let me have a
- 20 copy and then get the copies over to Mr. Fiske
- 21 so that he can -- that they're available for
- 22 the press today.

- 1 MR. SCHMIDT: IO think all of the
- 2 witnesses have redacted copies of their
- 3 written testimony. It's just the courtroom
- 4 testimony where there would need to be
- 5 redaction.
- JUDGE SIPPEL: Well, as I say,
- 7 it's hard for me to -- I mean I haven't gone
- 8 through Mr. Hawkins line by line, but I
- 9 listened to him yesterday and I don't know
- 10 where you're going to find the commercially
- 11 sensitive information that he was testifying
- 12 to.
- MR. SCHMIDT: Well, for example,
- 14 Mr. Carroll asked a few questions about dollar
- 15 figures involved.
- JUDGE SIPPEL: All right. Dollar
- 17 figures may go.
- ' MR. SCHMIDT: That would be one
- 19 example.
- JUDGE SIPPEL: A dollar figure is
- 21 easy to get out. Let me give you another
- 22 example. I looked through -- Was it Mr.

- 1 Furman that's up today?
- 2 MR. SCHMIDT: Yes, sir.
- JUDGE SIPPEL: And I think on the
- 4 last or the next to the last page of his
- 5 testimony it had specific names and specific
- 6 companies with some specific numbers.
- 7 MR. SCHMIDT: Absolutely.
- 8 JUDGE SIPPEL: Now that would go.
- 9 MR. SCHMIDT: Yes.
- 10 JUDGE SIPPEL: But I didn't see
- 11 anything else in there that should go.
- 12 MR. SCHMIDT: I think if Your
- 13 Honor looks -- I don't have that testimony in
- 14 front of me. But I think if Your Honor looks
- 15 that was probably the only information that
- 16 was redacted from Mr. Furman's testimony.
- JUDGE SIPPEL: I hope so. I hope
- 18 so. But I would like to see those redacts
- 19 because I'm going to take a hard look at them.
- 20 This idea of super secret protection is -- I
- 21 fell for it yesterday. I mean I really did
- 22 and I keep thinking that this case has got to

- 1 be moved along. I don't have time to open the
- 2 door and close the door and open the door and
- 3 close the door.
- 4 MR. SCHMIDT: But I actually have
- 5 Mr. Furman's testimony.
- 6 JUDGE SIPPEL: You don't have to
- 7 give it to me now.
- 8 MR. SCHMIDT: No, I just want to
- 9 say --
- 10 JUDGE SIPPEL: Go ahead and tell
- 11 me.
- MR. SCHMIDT: For the record.
- 13 JUDGE SIPPEL: I just read it. I
- 14 know it.
- MR. SCHMIDT: Yes, he has about 20
- 16 paragraphs of testimony. The first 16 have no
- 17 redactions. I'm sorry. The first 17 have no
- 18 redactions and it's literally when you get to
- 19 those two paragraphs that Your Honor
- 20 referenced, 18 and 19.
- JUDGE SIPPEL: Yes.
- MR. SCHMIDT: Where he referenced

- 1 specific companies and specific --
- JUDGE SIPPEL: Specific numbers.
- 3 MR. SCHMIDT: -- numbers that
- 4 that's where --
- 5 JUDGE SIPPEL: Those --
- 6 MR. SCHMIDT: Yes, and I think
- 7 that's the philosophy we applied. As I
- 8 understand it, that's the philosophy we
- 9 applied. So I'm not sure there's a
- 10 disagreement on what's covered and what's not
- 11 covered. It's just the logistics of getting
- 12 it out.
- JUDGE SIPPEL: Well -- Go ahead,
- 14 Mr. Carroll.
- MR. CARROLL: I agree with that,
- 16 Your Honor. I think for the direct testimony,
- 17 the direct written testimony, that has already
- 18 been done, redacted on both sides, and that's
- 19 easy because we've had the time to do it. The
- 20 problem as I understood it that it was created
- 21 yesterday and we've already had a day where my
- 22 cross of their witness has been in a closed

- 1 room.
- 2 Is that in live cross examination
- 3 in a rushed proceeding like this you cannot
- 4 plan in advance "Okay, this is the part where
- 5 I'll ask the super secret questions and this
- 6 is the part where I won't ask that." It's
- 7 asking too much to have an expedited
- 8 proceeding and you could see yesterday the
- 9 cross examination is very much on the fly.
- 10 It's very much back and forth and in the
- 11 middle of that as Mr. Schmidt said dollars and
- 12 cents numbers are coming out and being used.
- 13 There are some charts that have some numbers.
- 14 And that's the only information
- 15 that each side is looking to I think to
- 16 protect and I think that the proposal by the
- 17 Bloomberg gentleman which I thought was quite
- 18 a reasonable one when I read last night takes
- 19 care of that situation. It allows us in an
- 20 expedited proceeding just the time to check
- 21 that transcript quickly and take out those
- 22 dollar numbers before the press gets the

- 1 actual live transcripts.
- 2 The canned written submissions are
- 3 already redacted and there's no problem with
- 4 making those available. That's my
- 5 understanding.
- 6 JUDGE SIPPEL: All right. Well,
- 7 we just got finished with that. But if it's
- 8 a scope of the redactions that I'm also
- 9 concerned about. So I'll take your word for
- 10 it. You said that you're just taking numbers
- 11 out. There's no sense for me to see that.
- 12 That's all I'm interested in seeing going out.
- 13 But like what do I do with the
- 14 cross examination of Mr. Furman today? What
- 15 is wrong with letting the reporters in for
- 16 that?
- 17 MR. CARROLL: Well, I have two
- 18 issues. I don't think we should have a
- 19 proceeding where we change how we're doing it
- 20 in the middle of it because we had a
- 21 proceeding yesterday and the thing was closed
- 22 to the press and now we're going to open it up

- 1 to the press for certain witnesses and not
- 2 others. I think we ought to have a consistent
- 3 rule.
- 4 JUDGE SIPPEL: Well, maybe I made
- 5 a mistake yesterday.
- 6 MR. CARROLL: I don't think you
- 7 did.
- 9 bill of goods and maybe I sucker punched
- 10 myself. But why do I need Mr. Furman to be in
- 11 -- Why do you have to close it?
- MR. CARROLL: Because the
- 13 information that's redacted from the direct
- 14 testimony, the direct written testimony he
- 15 submitted, will be subject to cross
- 16 examination by our side.
- 17 JUDGE SIPPEL: Right.
- 18 MR. CARROLL: And our side has
- 19 emails that are filled with the names of the
- 20 entities, the dollar amounts at issue and the
- 21 information that's been designated as highly
- 22 confidential information. Your Honor, on

- 1 this, the only thing I'd say is if you want to
- 2 have a proceeding that makes it more available
- 3 on a live time basis and we're not doing it on
- 4 this expedited rushed basis it might be
- 5 possible to do that, if we had another three
- 6 weeks to get organized in a different way.
- But as Your Honor knows, we are
- 8 under a pretty severe time demand to get this
- 9 done on the basis that we're doing it and I
- 10 think the order that came down said in an
- 11 expedited fashion consistent with fairness and
- 12 justice at the same time. And I think that's
- 13 why I like the compromise. The compromise by
- 14 Bloomberg seems to recognize even though
- 15 they're on the 1st Amendment side clearly and
- 16 ably so. It recognizes that life's not
- 17 perfect when you're expediting things the way
- 18 we're expediting it and the lawyers on cross
- 19 ought to have the latitude to be able to go
- 20 with a certain issue that's highly
- 21 confidential whenever it is.
- The alternative would be we have

- 1 people jumping up in the middle of the hearing
- 2 and running out in and out of the hearing.
- 3 Now I've had proceedings in Delaware, for
- 4 example, Courts that are M&A proceedings
- 5 where you have everybody wanting to know super
- 6 secret information about companies and
- 7 takeover battles and sometimes you have closed
- 8 sessions of those proceedings and sometimes
- 9 you have people running in and out and
- 10 sometimes -- There are ways of doing it, but
- ll now when you've expedited it in that way that
- 12 we've expedited it here which again is why I
- 13 think the compromise works.
- 14 And I would propose that we at
- 15 least try to compromise. When you see the
- 16 nature of the redactions that Mr. Schmidt has
- done I think you'll see that we're only
- 18 talking about the hard core financial
- 19 information for the most part.
- 20 JUDGE SIPPEL: Well, I understand
- 21 that. I'm going to refer to Mr. Furman and I
- 22 think that's basically no problem. But since

- we're only eliminating -- Oh, you're saying to
- 2 me -- I see what you're saying. You're saying
- 3 on cross examination that you may be getting
- 4 into some stuff. All right.
- 5 MR. CARROLL: I've seen cross --
- 6 JUDGE SIPPEL: I know you'll get
- 7 into stuff. All right. Well, how about doing
- 8 the stuff towards -- Can we begin the cross
- 9 examination and then you say, "Okay, I've got
- 10 -- Your Honor, I now have" --
- 11 MR. CARROLL: I cannot do that and
- 12 that would not be fair to the scope of the
- 13 cross. I have to be able as you saw yesterday
- 14 with Mr. Hawkins. It is vitally important
- 15 that I be able to pick moments when I do
- 16 things in the order that I do them and I don't
- 17 have the time in this expedited proceeding to
- 18 sort of partition it in that way and then be
- 19 isolated from going back to it if it connects
- 20 up with something else I'm doing. I think
- 21 that really ties my hands in a cross
- 22 examination.

- JUDGE SIPPEL: I'll accept that at
- 2 face value. But let me ask the next question
- 3 I have and that is some of this, these
- 4 materials, even in the emails as though they
- 5 may be considered sensitive and certainly the
- 6 parties are going to have a better insight
- 7 into that than I am. But a lot of that seems
- 8 to me like it's historical data. I mean
- 9 drawing the line on protected trade secret
- 10 materials and sensitive commercial information
- 11 it's not the easiest thing in the world even
- 12 if you take time to do it. And if we're going
- 13 to err on the side of well, we'd better
- 14 protect it because we're not sure, I'm not too
- 15 happy with that approach.
- MR. CARROLL: That's a fair point.
- 17 As Your Honor knows from the evidence so far,
- 18 there are those MFNs that apply in this
- 19 industry and there's a lot of competitive
- 20 interest in the marketplace in businessmen
- 21 knowing what the terms of other deals are
- 22 because it affects what they think they might

- 1 be able to negotiate for. One of the reasons
- 2 that the historical information remains very
- 3 relevant today is that in the marketplace when
- 4 you're negotiating for transactions the other
- 5 guy always wants to know whatever he can know
- 6 about your other deals.
- 7 JUDGE SIPPEL: Makes imminent
- 8 sense. I was thinking about it at 4:00 a.m.
- 9 this morning.
- MR. CARROLL: Okay. 4:00 a.m.
- 11 this morning?
- 12 JUDGE SIPPEL: My question is --
- 13 Well, I wake up early. My question is however
- 14 at some point in time that becomes basically
- 15 useless information. I mean somebody's going
- 16 to walk in with a couple of nuggets that they
- 17 picked up in this transcript or something to
- 18 a negotiation a year from now or two years
- 19 from now and the other side is going to say,
- 20 "Go fly a kite. That stuff doesn't mean
- 21 anything. We're in this year. We're not in
- 22 last year." Numbers change and profits

- 1 change. Projections change. Everything
- 2 changes in that business. In any business.
- 3 I'm sorry.
- 4 But that's my horse backed
- 5 reaction to it. That's my layman's
- 6 appreciation of the significance of this
- 7 situation. But I'm just not convinced that
- 8 all of these emails need to be protected that
- 9 way.
- 10 MR. SCHMIDT: That's something
- 11 that, Your Honor, we'll be mindful of. The
- 12 problem we have with a lot of this data is
- 13 it's a very dynamic marketplace.
- JUDGE SIPPEL: Yes, sir.
- MR. SCHMIDT: Comcast is always in
- 16 the process of negotiating agreements. We've
- 17 negotiated two agreements just in the past few
- 18 days that we told the Court about yesterday.
- 19 These are long agreements. They look back at
- 20 the agreements that have been in place across
- 21 the last several years. They go forward.
- 22 One of the ones we talked about

- 1 yesterday doesn't even start until 2012. That
- 2 data is very important and I think we would
- 3 put before the Court that there is a competing
- 4 lst Amendment concern which is our access to
- 5 the courts. We can't come to the courts at
- 6 the risk of losing this valuable confidential
- 7 information. That would be a huge business
- 8 loss to the company if it lost the
- 9 information.
- 10 And if that's the penalty for
- 11 exercising our right of access to the courts
- 12 that becomes a real inhibition on the
- 13 companies. That's why we negotiated the
- 14 protective order and frankly spent a lot of
- 15 time trying to get it right. We hope that's
- 16 why Your Honor entered the protective order.
- 17 JUDGE SIPPEL: I did.
- 18 MR. SCHMIDT: And it does seem to
- 19 us that there is a balance that can be struck
- 20 where Your Honor has been very clear as to
- 21 where you want us to fall and there are close
- 22 questions on whether something is or is not